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In The
Supreme Court of the United States

October Term, 1990

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

**THE CITIZEN BAND POTAWATOMI INDIAN
TRIBE OF OKLAHOMA,**

Respondent.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Tenth Circuit

BRIEF OF RESPONDENT

G. LINDSAY SIMMONS
DOYLE, SIMMONS & BACHMAN
919 18th Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 659-4240

*Of Counsel to The
Citizen Band Potawatomi
Indian Tribe of Oklahoma*

December 12, 1990

MICHAEL MINNIS*
DAVID McCULLOUGH
MICHAEL MINNIS &
ASSOCIATES, P.C.
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 235-7686

*Attorneys for The Citizen
Band Potawatomi Indian
Tribe of Oklahoma*
*Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state can assess a tax against an Indian tribe?
2. Whether a state can pursue a counterclaim when sued by a Tribe solely seeking injunctive relief from an unlawful, proposed state tax assessment?

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CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The following constitutional provisions, treaties, statutes, ordinances and regulations are involved in this case.

A. Constitutions

1. United States Constitution

Section 8. The **Congress shall have power** to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

...

To **regulate commerce** with foreign Nations, and among the several States, and **with the Indian tribes**;

...

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

U.S. Const. art. I, §8.

2. Constitution of the State of Oklahoma

The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian, tribe, or nation; and that until the title to any such public land shall have

been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. Land belonging to citizens of the United States residing without the limits of the state shall never be taxed at a higher rate than the land belonging to the residents thereof. No taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Okla. Const. art. I, §3.

All property used for free public libraries, free museums, public cemeteries, property used exclusively for schools, colleges, and all property used exclusively for religious and charitable purposes, and all property of the United States, and of this state, and of counties and of municipalities of this state . . . shall be exempt from taxation . . . and such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws . . .

Id. at art. X, §6.

3. Potawatomi Tribal Constitution

Section 1. The jurisdiction and governmental powers of the Citizen Band Potawatomi Indian Tribe of Oklahoma shall, consistent with applicable federal law, extend to all persons and to all real and personal property, including lands and natural resources, and to all waters and air space within the Indian Country, as defined in 18 U.S.C. §1151 or its successor, over

which the Citizen Band Potawatomi Indian Tribe of Oklahoma has authority.

Constitution of the Citizen Band Potawatomi Indian Tribe of Oklahoma, art. 4 (June 26, 1936).

B. Treaties

ARTICLE 1. It being the intention of the government that a commission shall visit the Indian Country . . . , it is agreed that a delegation of the Pottawatomies may accompany said commission in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians; and if such location shall be found satisfactory to the Pottawatomies, and approved by the Secretary of the Interior, such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the exclusive use and occupancy of that Tribe . . .

. . .

ARTICLE 3. After such reservation shall have been selected and set apart for the Pottawatomies, it shall never be included within the jurisdiction of any state or territory, unless an Indian Territory shall be organized, as provided for in certain treaties made in Eighteen Hundred and Sixty-Six with the Choctaws and other tribes occupying "Indian Country;" in which case, or in case of the organization of a legislative council or other body, for the regulation of matters affecting the relations of the tribes to each other, the Pottawatomies resident thereon shall have the right to representation, according to their numbers, on equal terms with the other tribes.

Treaty of Feb. 27, 1867, United States - Pottawatomie Tribe of Indians, 15 Stat. 531.

C. Statutes

That all that portion of the United States now known as the Indian Territory (except so much of the same as is actually occupied by the five civilized tribes, and the Indian tribes within the Quapaw Indian Agency, and except the unoccupied part of the Cherokee Outlet), together with that portion of the United States known as the public land strip, is hereby erected into a temporary government by the name of the territory of Oklahoma . . .

Congress may at any time hereafter change the boundaries of said territory, or attach any portion of the same to any other state or territory of the United States, without the consent of the inhabitants of the territory hereby created: **Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements, and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which would have been competent to make or enact if this act had not been passed.**

Organic Act, May 2, 1890, 26 Stat. 81, §1.

That the inhabitants of all that part of the area of the United States now constituting the territory of Oklahoma and the Indian Territory,

as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: **provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this act had never been passed.**

Enabling Act, June 16, 1906, 34 Stat. 267, §1.

That the delegates to the convention thus elected shall meet at the seat of the government of said Oklahoma Territory on the second Tuesday after their election . . . and after organization, shall declare on behalf of the people of said proposed state, that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to, form a constitution and state government for said proposed government. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution:

Third. That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any

Indian, tribe, or nation; and that until the title to any such public lands shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States. That land belonging to citizens of the United States residing without the limits of said state shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Id. at §3.

D. Executive Proclamation

And Whereas, it appears that the said constitution and government of the proposed State of Oklahoma are republican in form and that the said constitution makes no distinction on civil or political rights on account of race or color, and is not repugnant to the Constitution of the United States or to the principles of the Declaration of Independence, and that it contains all of the six provisions expressly required by Section 3 of the said act to be therein contained;

Proclamation of Statehood, Nov. 16, 1907, no. 6869.

COUNTER-STATEMENT OF THE CASE

The Oklahoma Tax Commission ("Commission") is the petitioner. The Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi") is the respondent. This

action arose when the Potawatomi sought federal injunctive relief from the Commission's proposed \$2.7 million tax assessment against the Potawatomi.

The Citizen Band Potawatomi Indian Tribe - Background

The Citizen Band Potawatomi Indian Tribe of Oklahoma is a remnant of a vast Indian nation which inhabited most of the Great Lakes area for centuries until the white man arrived. "The traditional home of the Potawatomi seems to have been in the lower peninsula of Michigan."¹ Like most Indian tribes, the Potawatomi were pushed out of their native lands by the federal government and marched to various reservations. "Faced with a choice between the [white] settlers' demand for the land and its promise to the Indians, the government took the predictable course. Often with the use of military action, it forced many tribes to cede their lands in exchange for money and a promise of exclusive control over smaller areas called reservations."² The following description of the Potawatomi's removal to the West is typical: "subjected to fraud and chaotic planning, the

¹ L.N. Horton, "A Forest People of the Plains: The Potawatomi Indians", in R.E. Smith, *Oklahoma's Forgotten Indians* 24 (Okla. Historical Society 1981); see also G.I. Quimby, *Indian Life in the Upper Great Lakes: 11,000 BC to AD 1800* 108-112 (Chicago: Univ. of Chicago Press 1960).

² S. O'Brien, "Federal Indian Policies and the International Protection of Human Rights" in V. Deloria Jr., *American Policy in the Twentieth Century* 50 (Univ. of Okla. Press, Norman, Okla. 1985).

Potawatomis often were marched west under the supervision of political hacks more interested in making money than in the welfare of their charges . . . [which caused] undue suffering".³ "Scores fell by the wayside. Mothers carried dead babies they could not bring themselves to abandon. In one town so many people dropped from heat, exhaustion, lack of water and proper food, if not from utter despondency, that a doctor was called, and he found 300 'cases of sickness'." ⁴

Although the Potawatomis were pushed West in the late 18th century,⁵ they were not removed from their Great Lakes homeland until the signing of the Treaties of Chicago in 1833.⁶ After 37 years of being moved from place to place as the white settlers continued to push west,⁷ the Potawatomis were authorized by federal treaty

³ R.D. Edmonds, *The Potawatomis: Keepers of the Fire* 272 (Univ. of Okla. Press 1978).

⁴ J.U. Terrell, *Land Grab - The Truth About 'The Winning of the West'* 90 (Dial Press, N.Y. 1972).

⁵ See e.g. Treaty of Greenville, 1795, 7 Stat. 49 (Aug. 3, 1795); Treaty With the Potawatomi, 1815, 7 Stat. 123 (July 18, 1815); see also 7 Stat. 160 (Sep. 29, 1817) (certain lands in Ohio, Indiana and Michigan ceded); *id.* at 185 (Oct. 2, 1818) (certain lands in Illinois and Indiana ceded). The Potawatomis are, along with the Chippewas, the most treated Indian tribe in history. 26 *Chronicles of Oklahoma* 443 (Okla. Historical Society 1948).

⁶ See 7 Stat. 431 and 442 (Sept. 26, 1833), reprinted in II C.J. Kappler, *Indian Affairs Laws and Treaties* 402 (1904). By these treaties the Potawatomis ceded to the United States five million acres of land in Wisconsin, Illinois and Michigan.

⁷ The Potawatomis were moved, *inter alia*, to Iowa ("Trader's Point, near the present boundaries of Pottawatomie

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to purchase 576,000 acres in Indian Territory⁸ for the purpose of establishing a reservation which they did in 1870.⁹

Under the treaty which authorized the creation of their reservation, the Potawatomis were promised that

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and Mills Counties, Iowa"; Horton, *supra* p. 27), Missouri and Kansas. Each move was to a "permanent" home, e.g. Treaty With the Potawatomi Nation, 1846, 9 Stat. 853, art. 5 (June 5 and 17, 1846) ("as their land and home forever"). "After much hardship and heartbreak the Potawatomi arrived at the Osage River but the pressure of the expanding frontier failed to diminish. The influx of settlers was unrelenting. The displaced Indians were the victims of speculators, corrupt agents and politicians. Their timber was cut, their game was killed. The railroad, which built the 'Great West,' destroyed their rights and reservations . . . The Potawatomi were soon forced from the Osage River to the Kansas River west of Topeka but even this 'permanent' home was soon crumbling." J. Scott, *The Potawatomi: Conquerors of Illinois* (a pictorial history of the Potawatomi Indians of North America), p. 17 (Streator Historical Society, Streator, Illinois, 1981). See generally *Prairie Band of Potawatomi Indians v. United States*, 165 F.Supp. 139, 142-144 (Ct. Cl. 1958), cert. denied *sub nom. Hannahville Indian Community v. Prairie Band of Potawatomi Indians*, 359 U.S. 908 (1959).

⁸ The land was purchased by the Potawatomis from Seminole and Creek Sessions for \$199,796.08. This purchase was pursuant to Article 3, "February 27, 1867 Treaty", 15 Stat. 531.

⁹ See e.g. OIA, Record Letters Sent, No. 11, p. 7 (Nov. 9, 1870). The original reservation includes much of what is today Pottawatomie County, part of eastern Cleveland County, part of southeastern Oklahoma County, and a few acres of southwestern Lincoln County. For the Court's convenience, a map showing the reservation boundaries and a portion of the present tribal land is provided after the signature page.

their lands "shall never be included within the jurisdiction of any state". Art. 3, "February 27, 1867 Treaty", 15 Stat. 531 (1868). These promises have never been revoked and were protected in the federal laws which authorized statehood for Oklahoma.

However, no sooner had the Potawatomi reservation been established than the federal government began an allotment policy. The ultimate purpose of this allotment policy was to create "surplus" land within the reservation for white settlement.¹⁰ Over the next 25 years, most of the Potawatomi land was taken by the federal government. The government allotted some for distribution to individual Indians, held some for the benefit of the Potawatomis, and opened the "surplus" for settlement by non-Indians.¹¹ President Benjamin Harrison opened the

¹⁰ "Even removal to the Indian Territory did not protect the Potawatomis from white pressure. By 1876, squatters were encroaching on their new land. The agent reported that many white people were moving in and laying claims. Most of these white men, he claimed, were former outlaws, and these activities seemed in violation of the law, too." Horton, *supra* p. 37. "The Potawatomis . . . prospered in the new home, although they were soon to suffer again from the seemingly eternal plague of the white intrusion. White men entered their reservation, killing what little wild game was left, and in other ways they complicated the adjustment of these tribes." I G. Litton, *History of Oklahoma at the Golden Anniversary of Statehood* 267 (Lewis Historical Pub. Co., Inc. New York 1957).

¹¹ The allotments of the Potawatomi reservation land were authorized May 23, 1872. See 17 Stat. 159, reprinted in IV C.J. Kappler, *Indian Affairs Laws and Treaties* 946 (1927). The allotments actually began in 1875 and continued for 15 years when - after the passage of the "Dawes Act" (General

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Potawatomis' "surplus" lands (about 265,000 acres) for settlement by non-Indians on September 22, 1891.

Although this "allotment policy" dispersed and weakened the Tribe, the Potawatomis retained a presence within the original reservation boundaries.¹² "[T]he Potawatomis survived and many of them still live on the lands chosen by their ancestors in 1869." Horton, *supra* p. 38. In 1938, the Potawatomis organized a tribal government under the Oklahoma Indian Welfare Act.¹³ The purpose of this act was to help the Indians help themselves.

There is a popular impression that the Oklahoma Indians are wealthy. Such is not the case. Generally speaking, the Oklahoma Indians are living in total poverty on land unsuitable for cultivation, and with work opportunities nonexistent. Enactment of this legislation will open the door for many of these poverty-stricken people.

H. R. Rep. No. 2408, 74th Cong., 2d Sess. (1936). Now, just as the "open door" is showing some results beneficial to

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Allotment Act of 1887; 24 Stat. 388) - the remaining reservation lands were allotted, held by the federal government for use of the Potawatomis, or the "surplus" sold to white settlers. See 26 Stat. 1016 (Mar. 3, 1891). The approximate apportionment was 287,470.89 acres allotted, 510.63 acres held by the federal government for the Tribe, 22,653.55 held for schools, and 265,241.93 "surplus" opened for white settlement.

¹² The Potawatomis' tribal land now consists of approximately 371 acres exclusive of allotments. See map.

¹³ Oklahoma Indian Welfare Act of June 26, 1936, 49 Stat. 1967 (codified at 25 U.S.C. §§501-510).

the Indians, the state is seeking the judiciary's help in renegeing on promises to the Potawatomi Indians.

The Citizen Band Potawatomi Indian Tribe - Now

The Potawatomis have a tribal enrollment exceeding 10,000, operate on an annual budget exceeding \$10 million,¹⁴ have over 50 full-time employees and over 70 part-time employees, operate an 18-hole golf course, a convenience store, a tribal newspaper (How-Ni-Kan), a bingo hall, a museum and are the majority stockholder in a local bank in Shawnee. The Tribe has a Tax Commission, a Police Department and a Tribal Court. Although the Potawatomis cooperate closely with local authorities,¹⁵ they receive virtually no services from the State. The annual Potawatomi Pow-Wow provides a substantial economic boost to the local community. The Potawatomis have contracted to operate the local office of the Bureau of Indian Affairs and administer numerous federal programs. The Potawatomis have contributed property to the City of Shawnee, donated training and supplies to the Pottawatomie County Sheriff's Office, and co-sponsored the Older American Aid Program which provides in-home health assistance to Indians and non-Indians alike. More than 100 people per year receive job training

¹⁴ This budget figure includes federal monies administered by the Potawatomis, as well as income from tribal taxes and tribal enterprises.

¹⁵ The Mayor of Shawnee and Pottawatomie County Commissioners endorsed by resolution the placing of Potawatomi lands in trust. See doc. no. * [no number was assigned to this pleading, but it appears on the docket sheet between documents 39 and 40], exhibits of parties in support of opening briefs, PX-14, filed 6/22/87.

through the tribal JTPA program and an additional 60 economically disadvantaged youths receive training and employment through the summer months. The Potawatomis pay an average of \$20,000 per year to state-supported institutions of higher education attended by tribal members.

The Tribe is governed by a five-man Business Committee whose members receive no salary and have no claim to any revenues generated by tribal enterprises. All revenues generated by tribal enterprises are used to pay administrative costs, enhance tribal assets or are distributed to needy members of the Tribe.

The Potawatomis' status as an Indian tribe is recognized by the United States¹⁶ and by Oklahoma¹⁷. Consistent with Congressional policy,¹⁸ the Potawatomis engage in numerous enterprises in an attempt to become self-sufficient. One of these enterprises is a convenience store known as the "Potawatomi Tribal Store" (also known as "Gallery Trading Post") which the Potawatomis wholly own and operate. The Potawatomi Tribal Store was constructed with federal funds and is located on lands within the Potawatomis' original reservation boundaries.¹⁹ These lands have, since establishment of the Potawatomi

¹⁶ See 25 U.S.C. §503; 50 Fed. Reg. 6055 (1985).

¹⁷ "The State of Oklahoma acknowledges federal recognition of Indian tribes recognized by the Department of the Interior." OKLA. STAT. tit. 74, §1221 (1990 Supp.). See also Brf. 2.

¹⁸ See e.g. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973); 25 U.S.C. §450 et seq. and §1451 et seq.

¹⁹ See map after signature page.

reservation, been held by the Tribe or by the federal government for the benefit of the Tribe. They are now held in trust by the United States government for the benefit of the Tribe.²⁰

The Oklahoma Cigarette Tax

The Commission taxes the sale of cigarettes "within the State of Oklahoma" pursuant to the Cigarette Stamp Tax Act.²¹ Sellers of cigarettes in Oklahoma are required to be licensed:

Every manufacturer, wholesaler, warehouseman, jobber or distributor of cigarettes in this state, as a condition of carrying on such business, shall annually secure from the Tax Commission a written license. . . .²²

* * *

Every retailer in this state, as a condition of carrying on such business, shall annually secure from the Tax Commission a license. . . .²³

No license "shall be issued . . . to or held by a person who is not an actual resident and domiciled in" Oklahoma.²⁴

Payment of the cigarette tax must be evidenced by stamps purchased from the Commission.²⁵ The stamps

²⁰ Under the statutes authorizing the federal government to take these lands in trust, the lands are "exempt from state and local taxation". 25 U.S.C. §465; see also 25 U.S.C. §503.

²¹ OKLA. STAT. tit. 68, §301 *et seq.* (1981).

²² *Id.* at §304(a) (1990 Supp.) (emphasis added).

²³ *Id.* at §304(b) (1990 Supp.) (emphasis added).

²⁴ *Id.* at §319.

²⁵ *Id.* at §302 (1990 Supp.).

must be affixed to the cigarettes by every wholesaler "doing business" within the state²⁶ and it is the wholesalers' "duty" to supply the retailer with the necessary stamps to cover all "drop shipments" of cigarettes.²⁷

The Oklahoma Cigarette Stamp Tax is imposed upon the "first sale" within the state. "First sale" means first sale or distribution of cigarettes in intrastate commerce or first use or consumption within Oklahoma.²⁸ There can be, and is, only one "first sale". The cigarette stamp tax is imposed "only once on any cigarettes sold, used, received, possessed, or consumed in the state."²⁹

Under this tax scheme, the wholesaler usually makes the "first sale" within the state. In recognition of this fact, wholesalers are authorized to purchase tax stamps in bulk at a discount.³⁰ Thus, despite the statutory declaration that the "impact of the tax" is "on the vendee, user, consumer or possessor",³¹ the tax is clearly upon the wholesaler who pays for and affixes the tax stamps or, in

²⁶ *Id.* at §305(a).

²⁷ "[D]rop shipment" shall mean and include any delivery of cigarettes received by any person within this state when payment . . . is made to the shipper or seller by or through a person other than the consignee." *Id.* at §301(i) (1990 Supp.).

²⁸ *Id.* at §301(g) (1990 Supp.).

²⁹ *Id.* at §302 (1990 Supp.).

³⁰ *Id.* at §311.

³¹ *Id.* at §302 (1990 Supp.). This declaration was added to Oklahoma law in 1953 [1953 Okla. Sess. Laws 326 (eff. June 10, 1953)] after the Internal Revenue Service refused to allow an Oklahoma "consumer" a "sales tax" deduction [26 U.S.C. §23(c)(3) (1951)] for cigarette taxes paid. See *Commissioner of Internal Revenue v. Thompson*, 193 F.2d 586 (10th Cir. Okl. 1951).

the case of "drop shipments", on the retailer receiving the cigarettes. Because of spoilation, theft, or non-sales, the wholesaler or retailer never recovers what he pays for these tax stamps on an equal basis per pack.

If a person sells unstamped cigarettes in Oklahoma, the Commission requires that person to pay *twice* the amount of tax due.³² The Commission issues a letter to the putative taxpayer proposing to assess the tax, as doubled, plus a 10% penalty³³ and 1.25% per month interest.³⁴ The taxpayer must file a written protest within 30 days. If he fails to do so, or if his protest is rejected, the assessment becomes final.³⁵ A final assessment is like a final judgment; when filed with the county court clerk it can be executed upon and constitutes a lien on all of the taxpayer's real estate in the county.³⁶

The Potawatomi Cigarette Sales

The Potawatomis have never had an Oklahoma sales tax license or cigarette stamp tax license. Since establishment of their reservation until today, they have consistently sold items to the general public without collecting any state taxes.

³² OKLA. STAT. tit. 68, §305(c) (1981).

³³ *Id.* at §217(c) (1990 Supp.).

³⁴ *Id.* at §217(a) (1990 Supp.). At the time of the Commission's proposed assessment here, the interest was 1%.

³⁵ *Id.* at §221(e) (1990 Supp.).

³⁶ *Id.* at §221(h) (1990 Supp.).

After first following federal law,³⁷ the Potawatomis began selling cigarettes in August 1982. Before being sold, the cigarettes are affixed with the Potawatomis' own tax stamp. The proceeds of the Potawatomi cigarette tax and the profits generated by the tribal store finance tribal operations. The Potawatomis did not have, nor had it ever been required to obtain, a license from the Commission for such sales. The Tribe did not affix state tax stamps, nor collect the state's cigarette tax on its cigarette sales, nor had the Commission ever asked the Potawatomis to purchase, and the Potawatomis have never purchased, a Commission license to sell cigarettes. The Commission never informed the Tribe through written notice that it considered the Tribe or its activities to fall within the Commission's cigarette tax scheme nor did it attempt to license or assess the Potawatomis with any tax prior to February 12, 1987.

In fact, to this date, the Commission takes the position that the wholesaler selling to Indian tribes is liable for the cigarette stamp tax. *See City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122 (10th Cir. 1990), cert. denied, 111 S.Ct. 75 (1990). In *City Vending*, the Commission assessed taxes against the wholesaler for cigarettes sold to Indian tribes, including some of the same sales to the Potawatomis covered in the proposed assessment at issue here. *City Vending* protested. It was

³⁷ The Potawatomis enacted a cigarette tax ordinance consistent with federal (18 U.S.C. §1161) law which has been approved by the federal government and been published in the Federal Register. 47 Fed. Reg. 10,643, §§1-10 (1982). A copy is attached as Exhibit "A" to the Complaint. *See* Brf. in Opp. App. A7.

uncontroverted that the sales were to Indian tribes. Nevertheless, the Commission twice ruled that sales by City Vending to Indian tribes were not exempt from the cigarette stamp tax: that is, that cigarette sales to Indian tribes are not exempt from the Oklahoma cigarette tax.³⁸

The Commission's Proposed Assessment

In a letter dated February 2, 1987, Oklahoma mailed John Barrett a \$2.7 million proposed cigarette tax assessment³⁹ for cigarettes sold at the Potawatomi Tribal store. The assessment period was from December 1, 1982 to September 30, 1986. During this period, "the Tribe generated net income of \$58,173.00 from the convenience store." Doc. no. 33, pre-trial order, p. 9, ¶III-36, filed 6/8/87. The statute of limitations for a proposed tax assessment is three years.⁴⁰ Thus, approximately 25% of the proposed assessment (December 1, 1982 to February 1, 1984)⁴¹ was barred, on its face, by the

³⁸ The Commission specifically recognizes that sales to tribes are exempt from sales taxes under an exemption for "sales to the United States government". However, a Commission administrative law judge has held that a similar cigarette tax exemption [OKLA. STAT. tit. 68, §321 (1981) (cigarette sales "to the United States are hereby exempted from the stamp excise tax")] does not exempt cigarette sales to the Tribe. *In the Matter of the Cigarette Excise Tax of City Vending of Muskogee, Inc.*, Case No. P-85-151 (OTC Sep. 3, 1985); *In the Matter of the Protest of City Vending of Muskogee, Inc. of the Assessment of Tax, Penalty and Interest on Unstamped Cigarette Sales*, Case No. P-86-117 (OTC May 13, 1986). Lodging at 1 et seq..

³⁹ The actual alleged unpaid cigarette tax was \$1,108,413.90. Brf. in Opp. App. A25. The remaining portion of the proposed assessment was for penalty and interest.

⁴⁰ OKLA. STAT. tit. 68, §223(a) (1981).

⁴¹ Tax, penalty and interest for December 1, 1982 to February 1, 1984 was \$684,130.90. See Brf. in Opp. App. A29.

Commission's three-year statute of limitations. In addition, nearly half of the portion of the proposed assessment to Barrett not barred by the statute of limitations included cigarette purchases from City Vending (June 1985 through February 1986)⁴² upon which City Vending had already been assessed.⁴³ Barrett had 30 days from the date of the letter to file a written protest⁴⁴ or he, individually, would have been personally liable for nearly \$3 million in cigarette taxes. His only connection with the tribal store was that he had been a tribal officer or employee at various times during the assessment period. He had never worked in the tribal store nor sold cigarettes.

The Potawatomis Bring Suit

On February 18, 1987, the Potawatomis filed a complaint in the United States District Court for the Western District of Oklahoma⁴⁵ seeking to enjoin this proposed

⁴² City Vending was the Tribe's sole supplier from June 1985 through June 1986. Thus, the proposed assessment period June 1985 through February 1986 represents purchases from City Vending. The proposed assessment and penalty for this period was \$650,724.45 or 24.18% of the total. See Brf. in Opp. App. A29.

⁴³ Lodging at 10.

⁴⁴ Any effort to assert tribal immunity in such a protest would have been, as City Vending learned, in vain. *In the Matter of the Cigarette Excise Tax of City Vending of Muskogee, Inc.*, Case No. P-85-151 (Okla. Tax Comm. Sep. 3, 1985) (the "Oklahoma Tax Commission is without jurisdiction to determine the constitutional issues . . ." at p. 7, ¶ 2). Lodging at 6.

⁴⁵ Original jurisdiction was premised on Act of Oct. 10, 1966, 80 Stat. 880 (codified at 28 U.S.C. §1362). See Brf. in Opp. App. A2. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 474 (1976).

assessment, submitting to the district court's jurisdiction "for the sole and limited purpose of securing equitable relief", to-wit: a judgment enjoining Oklahoma "from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against" the Potawatomis or their "officers, agents or employees". See Brf. in Opp. App. A2, ¶1 (emphasis added). The Potawatomis also filed a motion for a preliminary injunction pending the trial court's ruling on the merits.

In a response filed February 23rd (the day of the hearing on the Potawatomis' motion for temporary injunction), the Commission represented that it intended to revoke the proposed assessment against Barrett and to re-issue the same proposed assessment against the Tribe "for State cigarette excise taxes due on the sale of cigarettes sold at the Gallery Trading Post".⁴⁶ Based on that representation, the Potawatomis were substituted as the subject of the proposed assessment. After the hearing, the Potawatomis' motion was granted and the Commission was temporarily enjoined from pursuing the proposed cigarette tax assessment against the Potawatomis.

Thereafter, the Commission answered and counter-claimed seeking declaratory relief and damages "pursuant to Rule 18(a)⁴⁷ of the Federal Rules of Civil

⁴⁶ Doc. no. 6, response to plaintiff's motion for preliminary injunction, p. 2, filed 2/23/87.

⁴⁷ This rule allows joinder of ancillary claims. The Commission did not cite Fed. R. Civ. P. 13. Thus, the Commission's representation that the "State answered and brought a counter-claim . . . pursuant to Rule 13(a) and Rule 18(a)" is not

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Procedure". See Brf. in Opp. App. B5, ¶II.A. The Commission alleged that the Potawatomis sold "cigarettes within the State of Oklahoma to the general public upon which state cigarette excise tax and sales tax has not been paid" and that these actions were "in violation of the state's laws and the federal common law as set forth in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)". Brf. in Opp. App. B5, ¶II.C. (emphasis added). The Commission asked the trial court to: (1) assume jurisdiction over all matters; (2) issue declaratory relief setting forth the rights and jurisdiction of the parties; (3) declare that Oklahoma has jurisdiction to tax Potawatomi sales; (4) declare that Oklahoma may enforce its tax laws against the Potawatomis by way of assessments and injunctions; and (5) enjoin the Potawatomis from selling cigarettes on which no state excise or sales taxes are collected or remitted. See Brf. in Opp. App. B6.

In alleging that the Potawatomis failed to collect "sales taxes" on cigarettes and praying for related relief, the Commission inserted an issue for which no underlying controversy existed, to-wit: the Commission has never sought to license or assess the Potawatomis for sales taxes. Further, most of the cigarette sales listed in the proposed assessment would have been "specifically exempted" from the Oklahoma sales tax.⁴⁸ The

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precisely accurate. See Brf. 4; see also Sol. Brf. 4 ("The Commission then filed . . . a counterclaim for declaratory and injunctive relief, pursuant to Fed. R. Civ. P. 13(a).").

⁴⁸ OKLA. STAT. tit. 68, §1355(B) (1981); see also *id.* at §302. In 1984, the Oklahoma cigarette tax code was amended and

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Potawatomis' motion to dismiss this counterclaim was denied. See Brf. in Opp. App. C1.

The matter was submitted upon stipulated facts and briefs. Thereafter, the district court held that the Potawatomis were "immune from liability for the assessment" and "permanently enjoined [the Commission] from collecting any state sales taxes against and/or collecting any state sales taxes from" the Potawatomis. See Pet. App. A10. However, the district court also granted, in part, the Commission's counterclaim. *Id.* at A9.

Both parties appealed. The Potawatomis appealed those portions of the judgment premised on the Commission's counterclaim. The Commission appealed from the portion of the judgment which enjoined the proposed tax assessment and declared sales of cigarettes to tribal members exempt from Oklahoma cigarette taxes.

The Tenth Circuit found that the District Court erred in denying the Potawatomis' motion to dismiss the Commission's counterclaim and reversed and remanded the case with instructions to dismiss the counterclaim for entry of "an injunction as prayed for by the Potawatomis".⁴⁹ *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d 1303 (10th

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cigarette sales thereafter were subject to the cigarette excise tax and to the sales tax. 1984 Okla. Sess. Law 551, 555 (eff. Apr. 21, 1984). See also OTC Rule 13.014.04 (Mar. 10, 1989).

⁴⁹ Thus, the Solicitor is engaging in hyperbole in stating that the Court of Appeals "ordered the entry of broad injunctive relief in favor of the Tribe." Sol. Brf. 18 (emphasis added).

Cir. 1989), cert. granted *sub nom.*, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 37 (1990).

Following these instructions, the Potawatomis moved the District Court to enter an injunction consistent with the mandate. The Commission did not oppose this motion and a permanent injunction was entered January 4, 1990 enjoining the Commission "from enforcing or attempting to enforce its taxing authority to assess a cigarette tax against" the Potawatomis. See Brf. in Opp., App. D1 (emphasis added).

The Commission petitioned this Court for review by certiorari which was granted October 1, 1990.

SUMMARY OF ARGUMENT

This case is about a proposed state cigarette tax assessment against an Indian Tribe. It is not about Indian Country, nor about seizing cigarettes bound for an Indian Tribe, nor about criminally prosecuting a person for selling unstamped cigarettes.

The Commission has no authority to assess an Indian tribe with a tax. Accordingly, the District Court and the Court of Appeals correctly granted the Potawatomis' request to enjoin the Commission's proposed tax assessment.

When an Indian tribe seeks injunctive relief from an unlawful, proposed state tax assessment, a state cannot pursue a counterclaim against the Tribe unless an independent basis exists for federal jurisdiction. The doctrine

of sovereign suit immunity precludes the Commission from pursuing such a counterclaim against the Potawatomis. The Commission did not have the authority to assess the Tribe with a tax. Thus, the Commission was engaged in an illegal act which was properly enjoined. There is no independent basis for jurisdiction to litigate any issue alleged in the Commission's counterclaim. Accordingly, the Court of Appeals was correct in reversing the District Court and ordering the dismissal of the Commission's counterclaim.

ARGUMENT

The precise relief sought by the Tribe was a judgment that permanently "enjoins . . . [Petitioner Oklahoma Tax Commission] from entering plaintiff's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against plaintiff".⁵⁰

The relief granted by the Tenth Circuit is clear and precise: "REVERSED and REMANDED for dismissal of Oklahoma's counterclaim and entry of an injunction as prayed for by the Potawatomis". *Citizen-Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Com'n*, 888 F.2d at 1307.

⁵⁰ See Brf. in Opp. App. A7 (emphasis added).

The permanent relief granted⁵¹ by the district court is likewise clear and precise, to-wit: Oklahoma is permanently enjoined "from entering the Tribe's Indian Country and from enforcing or attempting to enforce its regulatory and taxing authority to assess a cigarette tax against the Tribe".⁵²

Through its counterclaim, the Commission sought sweeping affirmative relief against the Tribe, including an order declaring that the Commission has jurisdiction to tax Potawatomi sales. All of the affirmative relief sought by the Commission was based upon hypothetical questions. The only actual controversy was the Commission's proposed tax assessment of the Potawatomis for unpaid cigarette taxes. Thus, *the only issue* here is whether or not the Commission can assess an Indian tribe with a tax.

⁵¹ The permanent injunction entered was the same as the original judgment with two exceptions: (1) the counterclaim relief was deleted and (2) the Potawatomi injunctive prayer was added. Thus, the permanent injunction also contains the language from the original judgment that permanently enjoined the Commission "from assessing the state sales taxes against and/or collecting any state sales taxes from plaintiff". The question of state "sales taxes" was never raised by the Potawatomis other than to point out that the Commission exempts the Potawatomis from paying sales taxes. See e.g. Brf. in Opp. App. D8, ¶ 10. The question of taxing sales by the Potawatomis was raised in the Commission's counterclaim. See *Id.* at B6, ¶ E.3. This sentence in the permanent injunction is a verbatim repetition of a sentence in the original judgment which was added, *sua sponte*, by the district court. See Pet. App. A10. It was simply repeated when the permanent injunction was entered after remand with no objection from the Commission.

⁵² Brf. in Opp. App. D10 (emphasis added).

PROPOSITION I

ABSENT CONGRESSIONAL AUTHORIZATION, STATES HAVE NO POWER TO TAX INDIAN TRIBES.

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indian's exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985) (emphasis added); see also *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 376-77 (1976); *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. at 480-82; *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 179-81 (1973). Despite the Commission's claim to the contrary (Brf. 37.), Chief Justice John Marshall's statement that the "power to tax involves the power to destroy"⁵³ has not lost any validity because of the passage of time. The Potawatomis' experience⁵⁴

⁵³ *McCulloch v. State of Maryland*, 4 Wheat. (U.S.) 316, 429 (1819).

⁵⁴ When the Potawatomi's lands were allotted in Kansas, the state taxing power was used to destroy Indian property rights. "Even though the law stated the land [allotted for the Potawatomis] was exempt from taxation until patent in fee simple was granted, the law was not enforced. Kansas officials assessed and collected taxes on many of these lands illegally and worst of all, after loss of his [sic] annuities, many Potawatomi land holders were hard-pressed for cash. They could then be easily coerced into selling their allotments at ridiculously low prices. Once an allottee had sold his land he

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— including this proposed assessment — proves the truth of Justice Marshall's observation.⁵⁵ Not even the federal government taxes an Indian tribe.⁵⁶ It is clear that the Commission's action which precipitated this suit (proposing a tax assessment against the Tribe) was patently illegal [*Montana, supra* p. 765] and thus properly enjoined.

PROPOSITION II

THE COMMISSION'S COUNTERCLAIM IS BARRED BY TRIBAL SOVEREIGN IMMUNITY.

The Court of Appeals correctly held that the Commission's counterclaim is barred by the Tribe's sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*

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was virtually in a vagrant status. As a non-land owner with none of the benefits of reservation Indians, he was adrift, without home, identity, or means of support." Horton, *supra* pp. 32-33. "[State] [t]axation was perhaps the most important single factor in the undoing of the Potawatomi allottees" in Kansas which led to their search for a home free of state jurisdiction in Indian Territory. Rev. J. Murphy, O.S.B., *Potawatomi of the West* 291 (1988).

⁵⁵ "A definite pattern of results was relatively certain: taxation, loss of land from delinquent taxes, white incursions, widespread alienation of land, and poverty-stricken, dispossessed Indians." Murphy, *supra* p. 285.

⁵⁶ Indian tribes are not taxable entities under the Internal Revenue Code. Rev. Rul. 67-284, 1967-2, c.b. 55, 58; Memo. Sol. Int., May 1, 1941, reprinted in 1 Opinions of the Solicitor of the Dept. of the Interior Relating to Indian Affairs 1917-1974, at 1044 (Wash.: Gov't. Printing Ofc., N.D.).

v. Martinez, 436 U.S. 49, 58 (1978) citing *Turner v. U.S.*, 248 U.S. 354, 358 (1919); *U.S. v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Puyallup Tribe, Inc. v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-173 (1977). A State may not condition an Indian Tribe's access to state courts on the Tribe's waiver of sovereign immunity to all civil causes of action, because such a condition would "invite[] a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-891 (1986).

Tribes are "domestic dependent nations," *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), exercising inherent sovereign authority over their members and territory. See *Duro v. Reina*, 495 U.S. ___, 110 S.Ct. 2053, 2060-2061 (1990); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Thus, tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Berthold Reservation*, 476 U.S. at 890; see also *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512 & n. 10; *U.S. v. State of Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981).

Longstanding Congressional policy strongly supports tribal immunity as well. Congress has a statutory policy of promoting the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)). Congress repeatedly has approved and decreed the established principle that Indian tribes are immune from suit.

Tribal sovereign suit immunity is only "subject to the superior and plenary control of Congress." Only Congress, therefore, may authorize suits against Indian tribes. *Santa Clara Pueblo*, 436 U.S. at 58. Any waiver of a Tribe's sovereign immunity can only be by Congress and may not be implied; it must be unequivocally expressed. *Ibid.*

The Commission concedes that Indian tribes have sovereign suit immunity and that only Congress can authorize suit against Indian Nations. Brf. 28-29. And, the Commission does not suggest that Congress has enacted a law authorizing suit here. Thus, the Commission admits that it has no authority for its counterclaim against the Potawatomis. Nevertheless, the Commission sidesteps the acknowledged authorizing body for suit - Congress - and asks this Court to "strike down the Tribe's immunity defense". *Id.* at 29. The Commission's rationale for urging this radical solution upon the Court is that the Commission must have "the ability to enforce" its tax laws in court. "A right implies a remedy since a right without a remedy is no right at all", argues the Commission. *Ibid.* The Commission's arguments highlight the pitfalls inherent in judicial attempts to act in areas reserved for Congress.

The Commission does not suggest that the Potawatomis consented to the Commission's broad counterclaim.⁵⁷ Likewise, there is no basis for concluding that

⁵⁷ The breadth of the Commission's counterclaim reaches far beyond the proposed tax assessment at issue. The counterclaim was filed "pursuant to Rule 18(a) of the Federal Rules of Civil Procedure." Brf. in Opp. App. B5, ¶ II.A. Through this

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the Tribe's narrow suit, brought solely for injunctive relief against the Commission's proposed direct assessment of the Potawatomi for back taxes, voided the Tribe's sovereign immunity by operation of law.⁵⁸

In *U.S. Fidelity & Guaranty Co.*, this Court held that sovereign immunity barred a cross-claim against a Tribe, because "[t]he desirability for complete settlement of all issues between parties must * * * yield to the principle of immunity." 309 U.S. at 512-513.7. The Court of Appeals adhered to this rule. (Pet. App. A3-A4). It would not permit the Commission's counterclaim to be filed in response to the Tribe's limited suit to prevent a proposed assessment of back taxes for sales of cigarettes in Indian Country. See *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1053 (9th Cir. 1985), rev'd on other grounds, 474 U.S. 9 (1985); *Confederated Tribes of Colville Indian Reservation v. Washington*, 446 F.Supp. 1339,

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Rule, the Commission strove to bring before the Court hypothetical issues: questions which were not implicated by either the Commission's proposed assessment of the Tribe, nor by the narrow relief requested by the Tribe to enjoin the proposed assessment of past taxes.

⁵⁸ Fed. R. Civ. P. 13 - which the Commission now cites - does not purport to dispense with a Tribe's sovereign immunity. See Advisory Commission Note 5 to Rule 13 (counterclaim provisions subject to admonition in Fed. R. Civ. P. 82 that Rules not be construed to extend district courts' jurisdiction). Moreover, Fed. R. Civ. P. 13 was not enacted by Congress, and it therefore cannot overcome tribal immunity. See 28 U.S.C. 2072(b) (1990) (rules "shall not abridge, enlarge or modify any substantive right.").

1351 (E.D. Wash. 1978) (three-judge court), aff'd in part and rev'd in part on other grounds, 447 U.S. 134 (1980).⁵⁹

The Commission recognizes that its counterclaim is barred.⁶⁰ Nevertheless, the Commission invites the Court to reconsider the doctrine of sovereign immunity. The Court should decline this invitation. Nothing in this case suggests that any abrogation of tribal sovereign immunity is appropriate. As the Solicitor General correctly states: "this Court has repeatedly held that only Congress may dispense with a tribe's sovereign immunity."⁶¹ This tax assessment case provides no reason for this Court to reexamine its own precedents affirming that principle. The Commission does not invoke any rights conferred on it by an Act of Congress. Its counterclaim arises solely under *state* law. "In the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes*, 476 U.S. at 891.

⁵⁹ The court below correctly rejected the district court's reliance on the doctrine of equitable recoupment as a basis for entertaining the Commission's counterclaim. See Pet. App. A4. Equitable recoupment is a defense to a suit for monetary relief that permits the defendant to offset the award in favor of the plaintiff by an amount the plaintiff owes to the defendant arising out of the same transaction. It is not a basis for awarding affirmative relief. See *U.S. v. Dalm*, 110 S.Ct. 1361 (1990); *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 511 & n. 6, (citing *Bull v. United States*, 295 U.S. 247 (1935)).

⁶⁰ The Commission concedes that *U.S. Fidelity & Guaranty* and *Puyallup* furnish "compelling" support for tribal immunity. (Brf. 29, 31-32).

⁶¹ Sol. Brf. 16.

The Commission should not be permitted to access the federal judicial system via an illegally-proposed tax assessment against an Indian tribe. To do so would reward the state for lawless behavior and effectively foreclose the federal courts as a vehicle for Indian tribes to protect themselves from state predatory behavior.

The Court of Appeals properly ordered the dismissal of the Commission's Rule 18 counterclaim.

Response to Brief of the Oklahoma Tax Commission

The Potawatomis here separately respond to the brief of the Petitioner because the Commission has not addressed the issues decided by the Court of Appeals. Rather, the Commission proceeds as if it had filed a lawsuit below to establish that reservations had been abolished when Oklahoma became a state. This "new lawsuit" is not premised on the federal laws which authorized statehood for Oklahoma nor on the Constitution of Oklahoma. Rather, it is premised upon written reports filed by the so-called Dawes Commission.

The Commission concedes that only Congress, not the judiciary, has power over Indian Tribes and Tribal land.⁶² Nevertheless, the Commission urges the judiciary to 'enact' laws so that the Commission can tax Indian tribes.⁶³ The Commission urges this Court to find that

⁶² Brf. 16-17. "[A]uthority over the tribal relations has been exercised by Congress from the beginning . . . not subject to be controlled by the judicial department" citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

⁶³ E.g. "[T]hese conflicts should be resolved by the Judicial Department of the Government." Brf. 29.

"state taxes are applicable to the Tribe's sales . . . because there are no reservations in Oklahoma." Brf. 5. According to the Commission, without reservations the Tribe has no "magical power to extinguish state laws like a legal kryptonite". *Id.* at 21.

Whether the Potawatomis have a reservation, or even own land, is irrelevant. The Commission acknowledges that the Potawatomis are an Indian tribe. As such, the Potawatomis cannot be assessed taxes by the Commission. The Commission's arguments regarding reservations in Oklahoma do not warrant consideration because the Commission cannot pursue its counterclaim.

Response 1: The Dawes Commission did not extinguish Indian Country in Oklahoma.

The Commission argues that the "several cession agreements and the work of the Dawes Commission in the years prior to statehood disestablished the reservation system in Oklahoma and Congress has since that time intended that no reservations be re-established." Brf. 5. The Dawes Commission reports are the linchpin for the Commission's argument that Indian "reservations" have never existed in Oklahoma.⁶⁴

⁶⁴ The Commission does cite the *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). Brf. 6. However, this case was not a suit by an Indian Tribe and has no factual similarities to the underlying controversy here. It was a suit by three individual Indians who were members of the Five Civilized Tribes. The dispute was over whether or not Oklahoma inheritance taxes applied to "cash and securities" restricted under a

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The Dawes Act (Indian General Allotment Act),⁶⁵ like other allotment acts which preceded and followed it, authorized the taking of Indian lands by force under the pretext of helping the Indians.

[The allotment policy] . . . is not to help the Indian, or solve the Indian problem, or provide a method of getting out of our Indian troubles so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement . . . The provisions for the apparent benefit of the Indian are but the pretext to get at its lands and occupy them. With that accomplished, we have surely paved the way for the extermination of Indian races upon this part of the continent. If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.

U.S. Congress, Committee on Indian Affairs, "Lands in Severalty to Indians: Report to Accompany H.R. 5038" H. R. Rep. 1576, 46 Cong., 2d Sess. (May 28, 1880), pp. 7-20. The Dawes Commission was created in 1893 long after the

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federal statute concerning Indians of the Five Civilized Tribes. *Id.* at 604 fn. 6. The Indian lands were held to be exempt from inheritance taxes. *Id.* at 612. In deciding that the "cash and securities" were not exempted by the federal statute, the Court noted that Congress authorized federal estate taxes of individual Indians. *Id.* at 608. As pointed out earlier (fn. 56 *supra*), the federal government does not recognize Indian tribes as taxable entities.

⁶⁵ Feb. 8, 1887, ch. 119, 24 Stat. 388.

Potawatomis' land had been allotted.⁶⁶ The Dawes Commission was established to overcome the refusal of certain tribes to give up their lands.⁶⁷ Specifically, the Dawes Commissioners were to negotiate with the Five Civilized Tribes "for the allotment in severalty of their lands and for the extinguishment of their tribal government, 27 Stat. 612, 645 Sec. 16". *U.S. v. Magnolia Petroleum Co.*, 110 F.2d 212, 215 (10th Cir. Okl. 1939). Their reports are suspect, *inter alia*, because of what was later learned about the men on the Dawes Commission, to-wit: that virtually all were involved in *sub rosa* Indian land speculation in Oklahoma.

⁶⁶ Allotment of Potawatomi lands began in 1872. 17 Stat. 159 (May 23, 1872). However, allotment and "purchase" of "surplus" lands (approximately 265,242 acres, or a little less than half of the reservation lands) began June 25, 1890 [28 Stat., 1016] and ended when the "surplus land" was opened to non-Indian settlement in a run on September 22, 1891. 27 Stat. 989 (Sept. 18, 1891). Although the Potawatomi lands were allotted, in part, under the Dawes Act, the allotments had nothing to do with the Dawes Commission. The 1891 Potawatomi allotment agreement was negotiated by the Jerome Commission.

⁶⁷ E.g. "[T]he Dawes Commission reports . . . contain insightful [sic] commentary on the corruption of tribal governments, the lamentable failure of the reservation system, the difficulties . . . in tribal negotiations." Brf. 15. "These statements accurately depicted the inconveniences of the white population, but flagrantly misrepresented the conditions and sentiments of the Indians and in a high moral turn urge the abolition of their institutions as a deliverance to *them*. Greed, philanthropy, and public opinion were thus united to break down the Tribe's defenses. What might have been advocated as a measure of cold-blooded realism was represented as a holy crusade." A. Debo, *A History of the Indians in the United States* 307 (Univ. of Okla. Press: Norman & London 1988). Compare fn. 10, *supra*.

Every member of the Dawes Commission and nearly every high Interior Department official in the territory was credited with stock in one or more of these companies [companies speculating in Indian land], and most of them were listed as officers and directors; and apparently almost everyone down to the humblest clerk in a government office had purchased a share. . . . It will probably never be known to what extent the private investment of federal officials in land companies may have influenced them to condone the plundering of Indian lands.

A. Debo, *And Still the Waters Run*, pp. 118, 120 (N.Y. Guardian Press, Inc. 1966). Whatever the significance of the Dawes Commission reports, they relate solely to the Five Civilized Tribes who were exempted from the Dawes Act.⁶⁸

Response 2: The Potawatomi Lands in Oklahoma are Indian Country.

The Commission asserts that since statehood, no "reservations" have existed in Oklahoma. The Commission makes this argument without reference to the federal statutes which authorized statehood for Oklahoma or the Oklahoma Constitution. These laws contained specific

⁶⁸ Feb. 8, 1887, ch. 199, 24 Stat. 388, at 391 (section 8). The Five Civilized Tribes were allotted under the subsequently-enacted Curtis Act [June 28, 1898, ch. 517, 30 Stat. 495. The Curtis Act was repealed by the Oklahoma Indian Welfare Act. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446, 271 U.S. App. D.C. 212, cert. denied *sub nom.*, *Hodel v. Muscogee (Creek) Nation*, 488 U.S. 1010 (1989)] and the Five Civilized Tribes Act [Apr. 26, 1906, ch. 1866, 34 Stat. 137].

language by which Oklahoma "forever" disclaimed any jurisdiction over Indian lands.

The Commission's focus on the word "reservation" is misplaced. The operative term of art for lands over which an Indian Tribe has jurisdiction is "Indian Country": land "validly set apart for the use of the Indians as such, under the superintendence of the Government". *United States v. Pelican*, 232 U.S. 442, 449 (1914). The Court of Appeals correctly held that lands within the Potawatomi's original reservation boundaries, held in trust by the federal government for the benefit of the Tribe, are "Indian Country" and, for the purposes of the statutory definition of Indian Country [18 USCA §1151(a)] are a "reservation". *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 888 F.2d at 1305-6.

Oklahoma's jurisdiction, or lack thereof, is not determined by the word "reservation". The Constitutional limitation on Oklahoma's jurisdiction refers to "all lands . . . owned or held by any tribe". Okla. Const. art. I, §3. Whether the Potawatomi lands in question are still part of a reservation or not, they are – and always have been – lands "owned or held" by a "tribe" and, Oklahoma has disclaimed jurisdiction over them. See *Yellow Cab Transit Co. v. Johnson*, 48 F.Supp. 594, 598-9 (W.D. Okl. 1942), affirmed *sub nom.*, *Johnson v. Yellow Cab Transit Co.*, 137 F.2d 274 (10th Cir. 1943), affirmed, 321 U.S. 383 (1944) (lands subject to Article I, §3 were "never a part of, or under the jurisdiction of, the Territory or State of Oklahoma, except as such jurisdiction has been specifically ceded to the State by Congress").

Response 3: *Moe* did not authorize state tax assessment of an Indian Tribe.

The Commission argues that this Court's decision in *Moe* controls the outcome of this case. First, *Moe* does not authorize a state to tax an Indian tribe for cigarette taxes. Second, *Moe* is only implicated in connection with allegations made in the Commission's counterclaim.⁶⁹ Because the Commission's counterclaim was properly dismissed, consideration of *Moe* is not necessary or appropriate here.

The Commission controlled how this dispute arose by proposing a tax assessment against an Indian tribe – the Potawatomis – for *cigarette* sales. No other factual controversy is properly before this Court.⁷⁰

The Solicitor General suggests that the Commission's "power to tax cigarettes sales to non-members is properly before the Court because it is subsumed in the question of whether the state may assess the Tribe for taxes due on such sales." Sol. Brf. 8. The Commission's power to tax cigarette sales to non-tribal members is not before this Court. It is not and cannot be "subsumed" in the question

⁶⁹ "C. That said actions of the plaintiff are in violation of the . . . federal common law as set forth in *Moe* . . ." Brf. in Opp. App. B5.

⁷⁰ The Commission has never proposed a tax assessment for unpaid *sales* taxes. Sales taxes were injected in this lawsuit by allegations in the Commission's counterclaim. "B. That plaintiff has sold and continues to sell cigarettes . . . upon which State . . . sales tax has not been paid." Brf. in Opp. App. B5. See also *Id.* at B6, E.5. Because no factual dispute existed over the collecting or paying of any sales taxes, this portion of the Commission's counterclaim should have been dismissed, in any event, for lack of an actual controversy. 28 U.S.C. §2201.

of whether the Commission can assess the Tribe with cigarette taxes. All parties concede that the Tribe is immune from tax and that the only measure taken by the Commission was to tax the immune entity – the Tribe – via a proposed tax assessment. What other measures may have been available to the Commission, and the legal issues surrounding such hypothetical measures, are not properly before this Court.⁷¹

The Solicitor supports its suggestion regarding the issues before the Court for review by referencing the District Court's Order:

The District Court not only enjoined the assessment; it also enjoined the Commission 'from collecting any state sales taxes on purchases by members of the [Tribe]' and denied what it understood to be the Tribe's 'request' for 'further permanent injunctive relief as to collection of state sales taxes on purchases by non-members'. *Ibid.* These portions of the judgment address collection of state taxes on future as well as past sales.

⁷¹ The Solicitor seems intent on litigating hypothetical questions by suggesting that the Court of Appeals be asked "to consider what measures the state might take to enforce its tax laws if those laws do apply to some such sales, and it is not clear what measures the Commission would propose to take." Sol. Brf. 18. The Potawatomis asked the District Court to enjoin a proposed tax assessment. That is the only factual controversy that exists between the parties. That factual controversy was unilaterally defined by the Commission. Had the Commission wanted answers to other questions about what it might or might not do, it should have taken actions consistent therewith. It did not. These hypothetical questions are inappropriate. U.S. Const. art. III, §2; *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-241 (1937).

Sol. Brf. 19-20. However, the first section of the District Court's order concerned a matter not in dispute, to-wit: the Commission recognizes that sales to the Tribe are not subject to the Oklahoma sales tax laws under a statutory exemption for "Sales to the United States Government".⁷² The Tribe never prayed for any relief relating to sales taxes nor would this have been necessary. No controversy existed between the parties regarding sales tax.⁷³ The second portion of the Solicitor's quote from the District Court order also concerns relief never requested by the Tribe. It was entered *sua sponte* by the District Court to fashion an order that responded to the Commission's assertion in the counterclaim that *Moe* controlled.

Moe would not be controlling even if a similar factual controversy existed here, that is, if the Commission had arrested a Potawatomi employee at the Tribal Store for selling cigarettes not bearing Oklahoma tax stamps.⁷⁴ This is true not just because of Public Law 280, but because of Oklahoma's absence of territorial jurisdiction over Indian lands.

Response 4: Oklahoma has no territorial jurisdiction over Indian lands.

⁷² OKLA. STAT. tit. 68, §1305(i) (1971). See fn. 38, *supra*.

⁷³ "[T]he Tribe itself not only is exempt from payment of state sales taxes (such exemption is recognized and acknowledged by the defendants in pleadings to this Court) . . ." Pet. App. A19 (Dist. Ct. Order filed 4/15/88).

⁷⁴ *Moe*, 425 U.S. at 467 ("Deputy sheriffs arrested Wheeler [who sold cigarettes on trust land for his own benefit] and an Indian employee for failure to possess a cigarette retailer's license and for selling non-tax-stamped cigarettes, both misdemeanors under Montana law.").

The concept of "jurisdiction" is a cornerstone of common law jurisprudence. It confines government exercise of power to those matters actually committed to government and over which government has lawfully extended its powers. "The foundation of jurisdiction is physical power . . ." *McDonald v. Mabee*, 243 U.S. 90, 91 (Holmes, J.) (1917). Thus, the general rule has been consistently applied that a state may not tax persons, property or interests which are not within its "territorial jurisdiction". *James v. Dravo Contracting Co.*, 302 U.S. 134, 138 (1937). This general rule includes sales taxes. *Straughn v. Kelly Boat Service, Inc.*, 210 So.2d 266, 267 (Fla. App. 1968) (Florida "had no power or jurisdiction to levy and collect taxes on" transactions occurring outside three-mile limit because beyond Florida territorial jurisdiction). This means that the event which is subject to the tax (*i.e.* the sale or transfer of possession) must occur in the territory of the taxing authority. This concept is recognized in the Commission's stamp excise tax law. ["There is hereby levied upon the sale . . . of cigarettes *within* the State of Oklahoma, a tax . . ." OKLA. STAT. tit. 68, 302 (1990 Supp.) (emphasis added) Compare Enabling Act on page 6, *supra* ("without the limits of said state")]. See *American Bridge Co. v. Smith*, 179 S.W.2d 12, 15 (Mo. 1944), cert. denied, 323 U.S. 712 (1944).

This doctrine can be illustrated by the following analogy. Suppose Maine sought to compel Canada to collect Maine taxes on sales in Canada. The "minimal burden"⁷⁵ on Canada of collecting Maine taxes would not give legal sanction to Maine's efforts. Absent a treaty, states have no legal right to compel Canada or any other country or

⁷⁵ The standard articulated in *Moe*, 425 U.S. at 483.

sovereign to collect that state's taxes. Absent federal authorization, states likewise cannot expect other states to be tax collectors. The same holds true of state taxation in Indian Country. Absent a federal statute giving states jurisdiction in Indian Country, state laws and powers to tax have no effect in Indian Country. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

Territorial jurisdiction is a prerequisite to the taxing power. *Miller Bros. Co. v. State of Maryland*, 347 U.S. 340, 342 (1954). "The state cannot legislate effectively concerning matters beyond her jurisdiction and within territories subject only to control by the United States." *Standard Oil Co. v. People*, 291 U.S. 242, 244-5 (1934).

This basic concept precludes the Commission from relying on the trilogy of cases⁷⁶ which have recognized the power of the state to impose a cigarette tax on sales of cigarettes to non-tribal members in Indian Country. In each of these decisions, the state seeking to impose the cigarette tax had some territorial jurisdiction within Indian Country.⁷⁷ The Commission cannot cite any

⁷⁶ *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

⁷⁷ In *Chemehuevi*, California was given limited criminal and civil jurisdiction over all Indian Country. See 28 U.S.C. §1360; *Colville*, *supra* p. 164, fn. 32 ("the Colville Tribe consented in 1965 to the state's assumption of jurisdiction."). In *Colville*, the Colville Tribe offered to come under state jurisdiction pursuant to Public Law 280. Wash. Rev. Code Ann.

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authority for exercising territorial jurisdiction in the Potawatomis' Indian Country. As shown above, the reports of the Dawes Commission are certainly not valid authority.

The Solicitor suggests that "the State's authority to tax cigarette purchases by non-members in *Moe*, *Colville* and *Chemehuevi* was not acquired pursuant to – but rather *existed independently of* – Public Law 280."⁷⁸ Sol. Brf. 23 (emphasis added). This *may* have been true in Montana, Washington, and California, but it is *not* true in Oklahoma. Where is the authority for the proposition that Oklahoma has territorial jurisdiction in Indian Country?

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§§37.12.010-37.12.070; *Tonasket v. State*, 525 P.2d 744, 746 (Wash. 1974) ("in January of 1965, the Colville Business Committee issued resolution 1965-4 requesting the State of Washington assume criminal and civil jurisdiction over the Colville Tribe and reservation . . . [The government] issued a proclamation assuming, on behalf of the state, the requested jurisdiction which the state has since exercised."). In *Moe*, Montana had assumed jurisdiction over Indian Country consistent with Public Law 280. *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1306 (D. Mont. 1975) ("Pursuant to P.L. 280, 67 Stat. 588, . . . the State of Montana assumed complete criminal and limited civil jurisdiction over Indians residing on the Flathead Reservation.").

⁷⁸ The drafters of Public Law 280 did *not* – as to Oklahoma – recognize any such "independently" existing jurisdiction. On the contrary, Congress acknowledged that in Oklahoma, Indian "lands were to remain under the *absolute* jurisdiction and control of the Congress of the United States" because of Oklahoma's constitutional disclaimer over Indian lands. See S. Rep. No. 699, 83rd Cong., 1st Sess., reprinted in 1953 U.S. Code Cong. & Admin. News 2409, 2414 (emphasis added).

What is the *law* which gives Oklahoma territorial jurisdiction over Indian lands? Neither the Commission nor the Solicitor provides an answer.

On the contrary, the authorities are ancient and consistent that Oklahoma has no territorial jurisdiction within Indian Country. As the U.S. Supreme Court has stated many times:

'[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history.' *Rice v. Olson*, 324 U.S. 786.

McClanahan, 411 U.S. at 168. This policy is reflected in two themes which have long characterized Indian law. The first is that the federal government has plenary control over Indian tribes;⁷⁹ that is, Congress tomorrow could forever and finally terminate the sovereign status of Indian tribes. The second, a corollary to the first, is that absent an exercise of this plenary power by Congress, the Indian tribes retain all of their sovereign rights to the absolute exclusion of the state. *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978); *U.S. v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986).

Unlike the Commission, the State of Oklahoma has long recognized that a grant of authority from the federal government is necessary before the state can exercise jurisdiction in Indian Country.

Since the beginning, then, it has been judicially developed by the federal courts and administrative officials that only Congress has plenary authority over Indian affairs to limit,

⁷⁹ *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977).

modify or eliminate their powers of self-government. *Talton v. Mayes*, 163 U.S. 376 (1896). In general, then, state jurisdiction in any matters affecting Indians can be upheld only if one of two conditions have been met: Congress has expressly delegated authority to the state or recognized some state power or the question involving Indians involves non-Indians to a degree. . . .

Concerning the State of Oklahoma, there has been no such Congressional delegation of authority. To the contrary, federal jurisdiction of Indian lands and affairs were reasserted in the acts of Congress organizing the Oklahoma Territory and preparing the territory for statehood.

10 Op. Att'y. Gen. 464, 465 (Okl. No. 78-176; Jan. 4, 1978) (emphasis added).⁸⁰ This general policy is reflected in the federal government's treaties with the Potawatomis and the statutes authorizing statehood for Oklahoma. In authorizing the creation of the Potawatomis' reservation, the U.S. government promised⁸¹ that the reservation lands would "never be included within jurisdiction of any state". Treaty of Feb. 27, 1867, United States - Potawatomie Tribe of Indians, 15 Stat. 531 (emphasis added). Although this promise has been indirectly abrogated (in part) by subsequent federal enactments which

⁸⁰ The Attorney General is the "chief law officer" of Oklahoma. OKLA. STAT. tit. 74, §18 (1981). Attorney General's opinions are binding on state officials unless inconsistent with a final determination of a court of competent jurisdiction. *York v. Turpen*, 681 P.2d 763 (Okl. 1984).

⁸¹ "[An Indian] treaty was not a grant of rights to Indians, but a grant of rights from them - a reservation of those not granted." *U.S. v. Winans*, 198 U.S. 371, 381 (1905), quoted with approval in *U.S. v. Wheeler*, 435 U.S. at 327 n. 24.

took away most of the Potawatomi reservation lands, it has not been revoked as to those Indian lands still held by the Tribe.⁸² In fact, subsequent to the allotment laws, the federal government specifically authorized Indian tribes to recover their reservation lands. Act of June 18, 1934, ch. 576, sect. 3, 48 Stat. 984 (codified at 25 U.S.C. §463).

The federal government, in admitting Oklahoma to the union, consistently required an acknowledgment that the federal government had exclusive jurisdiction in Indian Country.

That nothing in this Act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said territory under the laws, agreements, and treaties of the United States, or to impair the rights of persons or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights.

Oklahoma Organic Act, May 2, 1890, 26 Stat. 81, §1 (emphasis added).

That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public lands shall have been extinguished by the United States the same shall be

⁸² Although portions of a treaty may be repealed by implication, the treaty itself is not repealed. *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 413 (1968); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 938-9 (10th Cir. Okl. 1989).

and remain subject to the jurisdiction, disposal and control of the United States.

Oklahoma Enabling Act, June 16, 1906, 34 Stat. 267, §3. Oklahoma's constitution follows the Organic and Enabling⁸³ Acts in recognizing the lack of state jurisdiction in Indian Country.

The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by an Indian, tribe or nation . . . The same shall be and remain subject to the jurisdiction, disposal and control of the United States.

Okla. Const. art. I, §3 (emphasis added). As recently as 1978, the State of Oklahoma through its chief law officer acknowledged this jurisdictional limitation:

It appears, then, from the face and legislative history of the Congressional acts affecting Oklahoma, the Organic Act and the Enabling Act, that **there was no intent to extend jurisdiction to Indians, Indian tribes, or Indian Country within the territories upon the attainment of statehood.**

10 Op. Att'y. Gen. at 467. Cf. *DeCoteau v. District Court for Tenth Judicial District*, 420 U.S. 425, 428 (1975) ("It is common ground here that Indian conduct occurring on the trust allotments is beyond the state's jurisdiction,

⁸³ "And whereas, it appears that the said constitution and government of the proposed State of Oklahoma . . . contains all of the six provisions expressly required by Section 3 of the said Act [Enabling Act] to be therein contained." Proclamation of Statehood, Nov. 16, 1907, no. 6869.

being instead the proper concern of tribal or federal authorities."). "Article I, §3 of the Oklahoma Constitution constitutes a legal impediment" to the exercise of state court jurisdiction in Indian Country. *State v. Little Chief*, 573 P.2d 263, 265 (Okl. Cr. 1978); *see also C.M.G. v. State*, 594 P.2d 798, 799 (Okl. 1979), cert. denied *sub nom., Oklahoma v. C.M.G.*, 444 U.S. 992 (1979).

These limitations on Oklahoma's jurisdiction have been recognized in federal court.

[Art. I, §3] In the Constitution of the State of Oklahoma ~~Art. III, §1~~, . . . we found the following language: "The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, * * *."

It is therefore apparent that the original Fort Sill military reservation **was never a part of, or under the jurisdiction of, the Territory or State of Oklahoma** except as such jurisdiction has been specifically ceded to the State by Congress.

Yellow Cab Transit Co. v. Johnson, 48 F.Supp. 594, 598-99 (W.D. Okl. 1942), affirmed, 137 F.2d 274 (10th Cir. 1943), affirmed, 321 U.S. 383 (1944) (emphasis added); *see also U.S. v. State Tax Comm. of Mississippi*, 412 U.S. 363, 371 (1973) (state cannot require out-of-state vendors to collect and remit state taxes on liquor sold on federal military installations because "nothing occurs within the State that gives it jurisdiction to regulate the initial wholesale transaction"). Although *Yellow Cab* concerned a federal installation on "unappropriated public lands", the section quoted from the Oklahoma Constitution includes lands owned by Indian tribes. Thus, the result should be the same for Indian tribes, a result which, as noted above, has

been consistently supported by the Attorney General for the State of Oklahoma.

Accordingly, the Potawatomis' sales of cigarettes on Indian lands are beyond the territorial jurisdiction of the Commission and not subject to its laws and regulations, including its power to assess taxes.

CONCLUSION

The Court of Appeals was correct in reversing and remanding to the District Court for entry of an order dismissing the Commission's counterclaim and in directing that a permanent injunction be entered against the Commission barring it from *assessing* the Potawatomis with a cigarette tax. Accordingly, the permanent injunction which has now been entered and the Court of Appeals decision which authorized it should be affirmed.

Respectfully submitted,

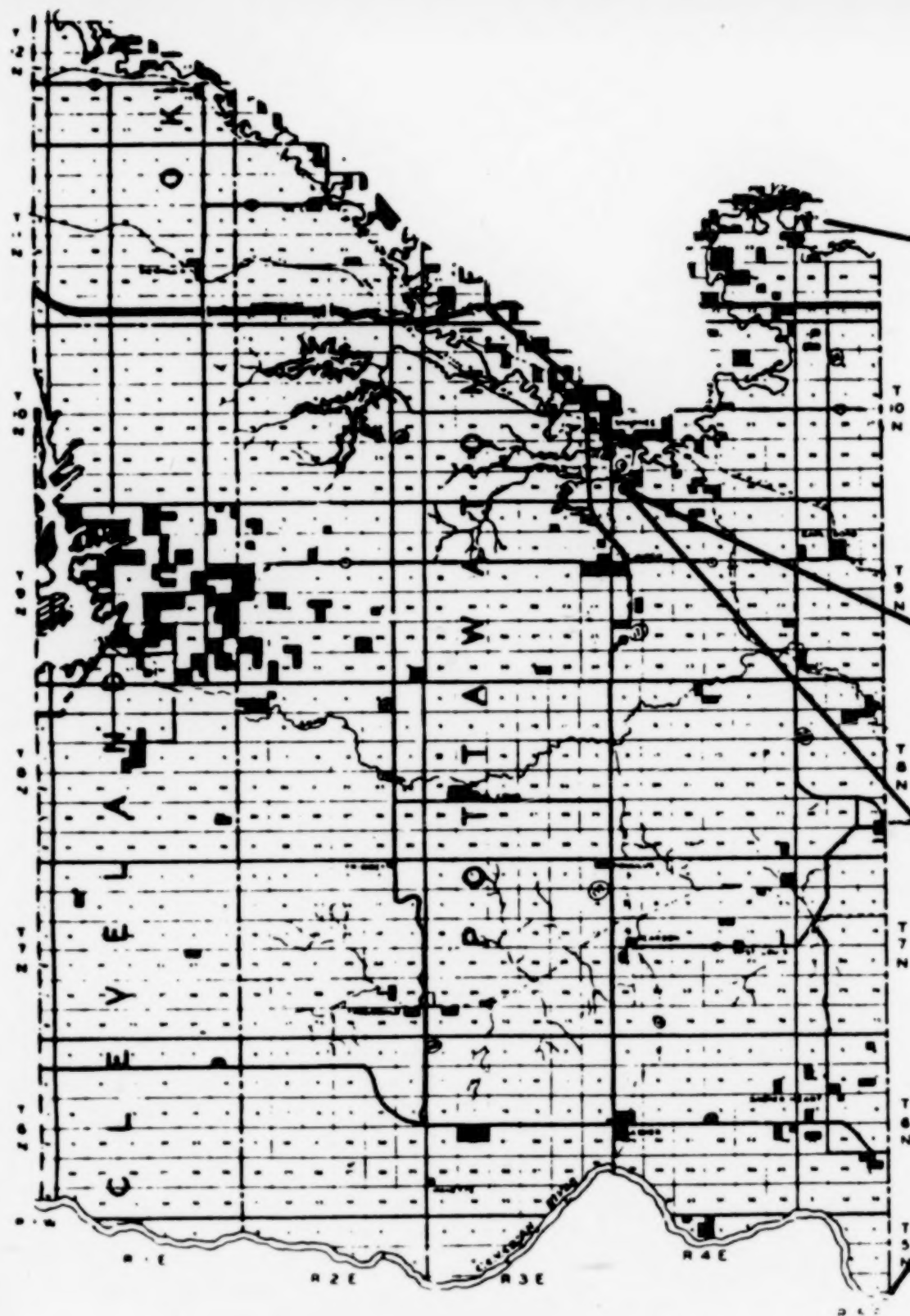
MICHAEL MINNIS*
DAVID McCULLOUGH
MICHAEL MINNIS &
ASSOCIATES, P.C.
1310 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 235-7686

G. LINDSAY SIMMONS
DOYLE, SIMMONS & BACHMAN
919 18th Street, N.W.
Suite 1000
Washington, D.C. 20006
(202) 659-4240

*Of Counsel to The Citizen
Band Potawatomi Indian
Tribe of Oklahoma*

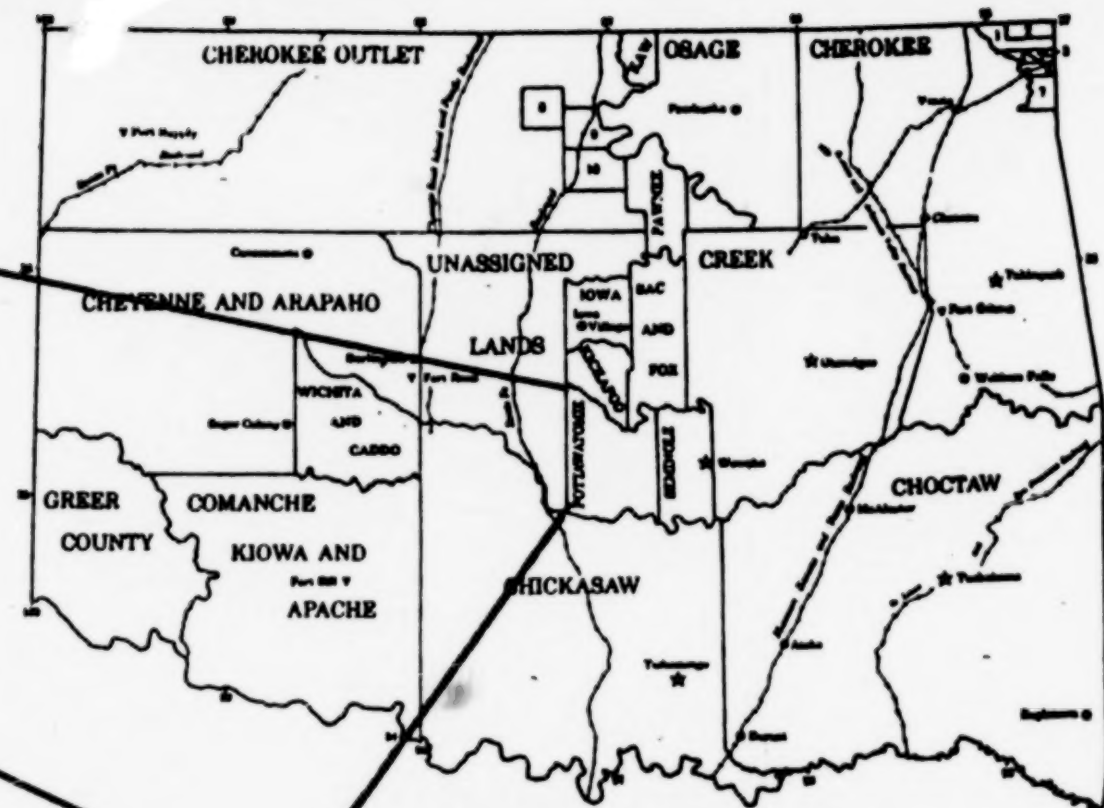
*Attorneys for The Citizen
Band Potawatomi Indian
Tribe of Oklahoma*

*Counsel of Record
December 12, 1990

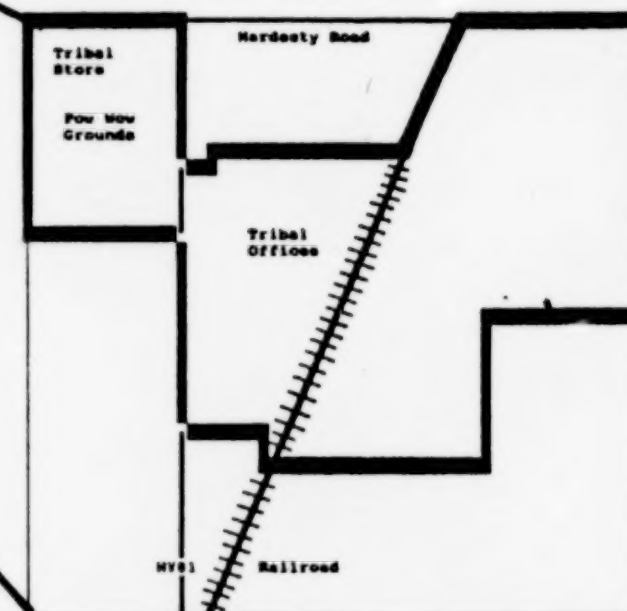


Original Potawatomi Reservation

[Darken areas allotments or Tribal lands]



Indian Territory (1890)



Potawatomi Tribal Lands
In Section 31-T10N-R4E
Exclusive of allotments, about 80%
of Lands now held by Tribe